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In the Supreme Court of the United States

OCTOBER TERM, 1949

Nos. 222 and 223

JOHN S. BLEKER, JR., AND RALPH L. ROBINSON,
PETITIONERS

v.

THE UNITED STATES OF AMERICA

ON PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (Tr. 1553-1563 [1]) is reported at 175 F. 2d 4.

JURISDICTION

The judgments of the Court of Appeals were entered May 26, 1949 (Tr. 1564, 1565), and peti-

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[1] The record is in nine volumes. Volume I is labeled "Clerk's Record," Volumes II-VIII contain the transcript of the trial proceedings, and Volume IX contains the proceedings in the Court of Appeals. Volumes II-IX are not paginated consecutively to Volume I. References to that volume are designated CR. and references to the succeeding volumes are designated Tr.

tions for rehearing were denied June 29, 1949 (Tr. 1566). The petition for writs of certiorari was filed July 29, 1949. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). See also Rules 37(b)(2) and 45(a), F. R. Crim. P.

QUESTIONS PRESENTED

The principal questions presented are:

1. Whether petitioner Robinson, a marine officer, was subject to trial by a civil court.

2. Whether cross-examination of petitioner Robinson relating to pre-trial statements he had made to investigating officers constituted reversible error.

3. Whether petitioners' acquittal on the conspiracy count of the indictment rendered their convictions on substantive counts void.

4. Whether a District Court sitting in one division of a district has jurisdiction to try defendants on an indictment returned by a grand jury convened in another division of the same district.

5. Whether the court prevented cross-examination of a government witness by petitioner Robinson's counsel.

STATUTE INVOLVED

Section 35(A) of the Criminal Code, 18 U.S.C. (1946 ed.) 80, provided:

> Whoever shall make or cause to be made or present or cause to be presented, for payment or approval, to or by any person or officer in

the civil, military, or naval service of the United States, or any department thereof, or any corporation in which the United States of America is a stockholder, any claim upon or against the Government of the United States, or any department or officer thereof, or any corporation in which the United States of America is a stockholder, knowing such claim to be false, fictitious, or fraudulent; or whoever shall knowingly and wilfully falsify or conceal or cover up by any trick, scheme, or device a material fact, or make or cause to be made any false or fraudulent statements or representations, or make or use or cause to be made or used any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry in any matter within the jurisdiction of any department or agency of the United States or of any corporation in which the United States of America is a stockholder, shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

STATEMENT

On August 21, 1946, a grand jury for the Southern District of California, convened at Los Angeles in the Central Division, returned an indictment in four counts against petitioners and one Robert S. Gleason for offenses alleged to have been committed in the Southern Division of the District Court for the Southern District of California (CR. 2-17). Count one charged a conspiracy between

petitioner Bleker, who was a major in the United States Marine Corps Reserve and Post Exchange Officer at Camp Pendleton, Oceanside, California, petitioner Robinson, a captain in the United States Marine Corps Reserve and assistant to Bleker, Gleason, a civilian employed at the post exchange as office manager, and others unknown, to defraud the United States by depriving it of the honest, conscientious, faithful, and disinterested services of petitioners in the discharge of their duties and by impairing, obstructing, and defeating the lawful functions of the Army, Marine Corps, and Navy in supervising the sale of merchandise of post exchanges, and to violate Section 35(A) of the Criminal Code (18 U.S.C. (1946 ed. 80) by knowingly and wilfully concealing and covering up material facts within the jurisdiction of such departments and agencies of the United States by trick, scheme and device and by making and causing to be made false statements and representations in matters within the jurisdiction of those agencies (CR. 2-11). Count two alleged that during March and April 1946, the defendants knowingly and wilfully concealed and covered up from the United States Marine Corps the fact that one Dave Rose, a civilian dealer, agreed to pay and did pay to the defendants the sum of $8,146.90 as one-half of his profits in the resale of certain watches which had been sold to him by the Camp Pendleton Post Exchange and that the defendants concealed and covered up this fact by the trick, scheme, and device

of making entries on the books and records of the post exchange representing that the watches were sold to Rose at a total price of $38,174, and failing to record the sum of $8,146.90 as a part of the price, in violation of Section 35(A) of the Criminal Code (CR. 12-13). Count three alleged that the defendants knowingly and wilfully concealed and covered up from the United States Army the fact that certain equipment purchased from the Los Angeles Port of Embarkation Post Exchange for $1,675.25 was purchased for their own benefit and resale, and not on behalf of or for use of the Camp Pendleton Exchange, and that the defendants covered up and concealed this fact by various tricks, schemes and devices, among which were the use of a certification to the Los Angeles Port of Embarkation Post Exchange that the equipment was purchased for use at Camp Pendleton, the issuance of a Camp Pendleton purchase order covering the equipment, the destruction of the Camp Pendleton's copies of such purchase order, and the making of an entry in Camp Pendleton's records that such purchase order was void (CR. 13-16). Count four alleged that the defendants knowingly and wilfully made and caused to be made a false and fraudulent certification, in a matter within the jurisdiction of the Army, that certain equipment purchased by defendant Robinson from the Santa Ana Air Base Post Exchange was for the establishment or maintenance of his own business or for his own personal use and not for resale, and that such certification

was false and fraudulent in that Robinson purchased the equipment for resale by the defendants to civilian dealers not authorized to purchase it directly from the post exchange (CR. 16-17).

Prior to trial, Gleason withdrew his plea of not guilty and entered a plea of guilty to counts two and three (CR. 134-135). After trial in the Southern Division (see CR. 132-133, Tr. 2), Bleker was found guilty on count three and not guilty on counts one, two, and four; Robinson was found guilty on counts two, three, and four and not guilty on count one (the conspiracy count) (Tr. 1544). Bleker was sentenced to pay a fine of $5000, and Robinson was fined $5000 on counts two and four and sentenced to one year imprisonment on count three (CR. 314-317). The convictions were affirmed on appeal (Tr. 1564, 1565).

ARGUMENT

After careful consideration of the lengthy record and the many errors assigned by petitioners separately, the Court of Appeals properly concluded that no error existed as to either petitioner. Petitioners raise no point of substance before this Court and there is no occasion for further review.

While numerous questions are assigned by petitioners (see Pet. 13-18), the argument is devoted only to a limited number of them and principally concerns petitioner Robinson.

1. Petitioner Robinson contends (Pet. 22-37) that, being a member of the armed forces, only a

court martial, not a civil court, had jurisdiction to try him for "offenses or acts within his duties" (Pet. 22). He relies, rather curiously, on the portion of the Fifth Amendment which provides

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger * * *,

and he asserts that the question has never been decided by this Court (Pet. 28-29). He is clearly in error, for this Court has repeatedly held that civil courts have concurrent jurisdiction with courts-martial over offenses denounced, as here, by both the Articles of War and the criminal laws of the United States. Lower courts have also so held. *Ex parte Quirin,* 317 U. S. 1, 25-27; *Caldwell* v. *Parker,* 252 U. S. 376; *Franklin* v. *United States,* 216 U. S. 559; *Ex parte Mason,* 105 U. S. 696; *Coleman* v. *Tennessee,* 97 U. S. 509; *Kennedy* v. *Sanford,* 166 F. 2d 568 (C. A. 5), certiorari denied, 333 U. S. 864; *United States* v. *Canella,* 63 F. Supp. 377 (S. D. Cal), affirmed, 157 F. 2d 470, 482 (C.A. 9).

2. Petitioner Robinson contends that his cross-examination by the Government was improper and a denial of due process (Pet. 30-34). The record reflects that after the direct examination of Robinson, government counsel on cross-examination asked him whether he had made certain inconsist-

ent oral statements to investigating officers on a prior occasion (Tr. 1339-1345). Counsel for petitioner objected to this line of questioning and requested opportunity to show that any admissions made by petitioner were involuntary. The court held that such questioning was proper cross-examination and overruled the objection, but with leave to petitioner, if the occasion should arise, to show on redirect examination the circumstances under which the statements were made (Tr. 1342). After the conclusion of the cross-examination, counsel for petitioner was allowed to show on redirect examination the circumstances of the interview with the investigating officers (Tr. 1397-1402). At no time was any prior statement offered in evidence or even marked for identification. Petitioner was at liberty, on his cross-examination, to admit, deny, or explain any statements he had made before trial and his answers were binding on the Government. We think the District Court was right in holding that this use of petitioner's statement, solely for impeachment purposes, was proper and that it in no way deprived petitioner of any rights guaranteed by the Fifth Amendment. See *Caminetti* v. *United States,* 242 U. S. 470, 494; *Raffel* v. *United States,* 271 U. S. 494, 497-499; *Viereck* v. *United States,* 139 F. 2d 847, 851 (C.A. D.C.), certiorari denied, 321 U. S. 794.

3. There is no merit in petitioners' contention (Pet. 36) that the jury's finding of not guilty on

the conspiracy count required acquittal on the substantive counts, under the principle of *res judicata.* Each count in an indictment is regarded as a separate offense and even if the same evidence is offered in support of each, an acquittal on one could not be pleaded as *res judicata* of the other. *Dunn* v. *United States,* 284 U. S. 390.[2] It is settled too that "the commission of the substantive offense and a conspiracy to commit it are separate and distinct offenses." *Pinkerton* v. *United States,* 328 U. S. 640, 643.

Petitioners rely solely on *Sealfon* v. *United States,* 332 U. S. 575, in support of this contention. However, in that case, too, it was recognized that the commission of the substantive offense and a conspiracy to commit it are separate and distinct offenses. The ruling that the acquittal, on the indictment for conspiracy to defraud by presenting false invoices, was *res judicata* as to a second indictment for aiding and abetting the publishing of the same false invoices was, as the court below correctly pointed out, based on vitally different circumstances from those in the instant situation. The crux of that case at the second trial was an alleged agreement necessarily found in the first trial to have been non-existent. There is no similar inconsistency here between the absence of a conspiracy

[2] The Court of Appeals found there was sufficient evidence to convict Bleker on count 3, and "as to Robinson it may be said that there was a great abundance of evidence to support the verdict as to each count upon which he was convicted" (Tr. 1557).

and the individual commission of the substantive offenses.

4. Petitioners also claim (Pet. 38-39) that the trial court was without jurisdiction to try them because they were indicted by a grand jury sitting in another division of the Southern District of California. It is settled, however, that a grand jury sitting in any division of a multiple-division district may lawfully indict for crimes committed anywhere in the district. *Salinger* v. *Loisel*, 265 U. S. 224, 237. All that is required is that the trial be held in the division where the offense was committed. See Rule 18, F. R. Crim. P. and note of the Advisory Committee; *Borgia* v. *United States*, 78 F. 2d 550 (C.A. 9), certiorari denied, 296 U. S. 615; *Mizell* v. *Vickrey*, 36 F. 2d 327 (C.A. 10).

5. Petitioner Robinson further contends (Pet. 41-42) that the trial court required his counsel to cross-examine Colonel Selden, a witness for the prosecution, at a time when the greater part of Selden's testimony had been received in evidence only as against petitioner Bleker, and denied the right to cross-examine Selden when the testimony previously limited to Bleker was, on motion of the Government, admitted against both petitioners. This contention is contrary to the facts disclosed by the record.

The record shows that Colonel Selden was called as a witness by the prosecution and testified without limitation except as to two conversations between

him and Bleker (Tr. 2-37). At the conclusion of the direct examination and cross-examination by Bleker's counsel, the court asked Robinson's counsel whether he desired to cross-examine the witness. Robinson's counsel stated that he had no desire to cross-examine the witness concerning anything admitted against Robinson but that he might wish to cross-examine him later if the portions of his testimony limited to Bleker should thereafter be admitted against Robinson. The court stated that counsel must conduct his cross-examination before the witness left the stand and that if he did not do so the witness would not be called back later unless counsel wanted to make him his own witness; the court observed that the case could not be tried piecemeal. (Tr. 65-66). The record thus clearly indicates that Robinson was given full opportunity to cross-examine the witness. At the conclusion of the Government's case, when certain portions of Selden's testimony previously limited to Bleker were admitted as against Robinson (Tr. 914-922), no request was made by counsel for Robinson for permission to cross-examine Selden. In these circumstances, Robinson cannot now be heard to complain that he was deprived of his right to cross-examine the witness. *Blumenthal* v. *United States*, 158 F. 2d 883, 891 (C.A. 9), affirmed, 332 U. S. 539.

CONCLUSION

For the foregoing reasons, we respectfully submit that the petition for writs of certiorari should be denied.

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